In the Supreme Court of the United States.

OCTOBER TERM, 1898.

The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 106.
The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 169.
The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 170.

STATEMENT OF CASE.

These three cases have been consolidated for argument for the reason that the principal question involved in each case is the same, and appellant submits but one brief to cover its appeals in all of the cases.

The first of these cases was begun by the filing in the district court for Bernalillo county, in the Territory of New Mexico, by the district attorney for the territory, of an intervening petition on behalf of the territory praying for an order against the receiver of the Atlantic and Pacific Railroad Company, requiring him to pay the amount of taxes claimed to be due upon the improvements on the right of way of said railroad company in the county of Bernalillo, and upon station

houses and other improvements at seven different stations in said county. The taxes claimed were for the years 1893, 1894 and 1895.

The receiver above referred to had been appointed at the instance of the United States Trust Company of New York in a suit brought to enforce the lien of a mortgage made to secure the first mortgage bonds of the railroad company.

It was contended on behalf of the receiver that the property sought to be taxed was exempt from taxation by virtue of section two of "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast", which became a law July 27, 1866. So much of said section as is material to this controversy, is as follows:

> And be it further enacted that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water-stations; and the right of way shall be exempt from taxation within the territories of the United States.
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> *14 Statutes at Large, 292.*

The argument in favor of this claimed exemption was that the donation of the right of way was such as to vest in the railroad company a title in absolute fee simple to land one hundred feet in width on each side of said railroad where it might pass through the pub-

lic domain; that all of the improvements sought to be taxed were affixed to and had become a part of the realty; that the land being exempt from taxation by the act of Congress, all improvements which were affixed thereto were also exempt from taxation as apart thereof.

The Territory contended that the right of way donated was only an easement and that alone was exempt from taxation, in accordance with the general rule that all exemptions from taxation are to be strictly construed; that even if the railroad company owned the land, over which it had a right of way, in absolute title, yet the exemption was of the land only, and for purposes of taxation the improvements thereon were separable from the land and properly subject to tax; and that, if there were merely a doubt as to the exemption extending to the property sought to be taxed, the existence of that doubt was fatal to the claim of exemption.

The district court held with the territory, the opinion of the judge of that court being found at page 55 of the printed record. Upon appeal to the supreme court of the territory that court reversed the decree of the court below and dismissed the intervening petition of the territory. From that decision the territory has appealed to this court.

After the decision of the supreme court of the territory, the second of these cases was begun by a like intervening petition filed in the same district court for the purpose of obtaining the payment of taxes on similar property in the county of Valencia for the years 1892 to 1896, both inclusive. The district court upon a hearing as to sufficiency of pleas to that intervening petition, declined to pass upon that question and dismissed the intervening petition because it fell within the decision of the supreme court of New Mexico theretofore rendered in the first of these

cases. Upon appeal to the supreme court of the territory this decree was affirmed and an appeal was then taken to this court.

In this case it appears that in Valencia county the railroad line runs over what was public domain of the United States when the right of way was granted, for a distance of 33 miles, and over land which was held in private ownership at the time of said grant, for a distance of 60.7 miles.

Record in No. 169, pp. 80-1.

The third of these cases was begun in like manner for the purpose of setting up the claim of the territory for taxes in Bernalillo county for the year 1896 upon the same kind of property, and the same proceedings were had in this case as in the second one.

While the defenses made in the district court raised a number of minor points as to mode of assessment and other like matters, yet it is obvious that the main question for consideration, and, indeed, the only one passed upon by the supreme court of New Mexico, is as to the effect of the exemption contained in that part of section two of the act of Congress already hereinbefore quoted. To that question alone will attention be given in this brief.

The appellant has made, in the several cases, the following

ASSIGNMENTS OF ERRORS:

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 106.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause, and specifies for error the following:

1. The supreme court of New Mexico erred in reversing the decree of the district court of Bernalillo county.

2. The supreme court of New Mexico erred in denying and dismissing the intervening petition of appellant.

3. The supreme court of New Mexico erred in finding that there had been any assessment for taxes of the right of way and necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations in the county of Bernalillo, territory of New Mexico.

4. The supreme court of New Mexico erred in finding that the taxes and penalties levied on the improvements placed on the right of way and other grounds of the Atlantic & Pacific Railroad Company were unlawfully and illegally levied.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 169.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause and specifies as such error in the said decree that the supreme court of New Mexico erred in dismissing the intervening petition of the appellant.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 170.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause and specifies as such error in the said decree that the supreme court of New Mexico erred in dismissing the intervening petition of the appellant.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

POINTS AND AUTHORITIES.

I.

A right of way is a mere easement, and the grant of a right of way does not carry the fee to the land.

When words and phrases which have acquired well-known, technical meanings in the law, are used in a statute, the rule of construction is that no other or different meaning shall be given to them.

Cooley's Const. Lim., 60.

Sutherland on Statutory Construction Sec. 247, 346.

Reference to any standard law dictionary will show that a right of way is a mere easement, and that a conveyance of a right of way cannot be held as conveying the fee in the land.

> "Right of way" in its strict meaning, is "the right of passage over another man's ground;" and its legal and generally accepted meaning, in reference to a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase, (*Mills on Em. Dom., Sec. 110.*) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way.

Williams vs. Western Union Railway Co., 50 Wis., 76.

Ottumwa R. R. Co., vs. McWilliams, 71 Iowa 164.

Kellogg vs. Malin, 50 Mo., 499-500.

Atlantic & Pacific R. R. Co., vs. Lesueur, 19 Pac. 157.

Lyon vs. McDonald, 78 Texas, 71.

Lumby vs. Vermont Cent. R. R. Co., 24 Vt. 387.

Chicago & Southwestern R. R. Co., vs. Swivney, 38 Iowa 182.

Probably the only authority to be found any where

which even appears to militate against this position, is the case of the *Railway Co. vs. Roberts, 152 U. S., 114.* In that case, at page 122, referring to the grant of a right of way similar to the one under consideration in the present case, the court said:

> No such right was relinquished until after the grant of the right of way, under the act of Congress of July 26, 1866, to the Missouri, Kansas & Texas Railway, and the title of the lands composing the right of way had become vested in that company.

It was urged below on behalf of appellees that this is an adjudication that the absolute fee in the land passed to the railway company by the act of congress. An examination of this case will show that this point was not involved, that the court refers to the vesting of the title in a cursory way, and that the construction sought to be placed upon the language of the court by appellees is a strained one. The comment of Judge Ross upon this language is so pertinent that we quote it as follows:

> No point appears to have been made in the case as to whether the right of way there granted to the railway company was but an easement, or carried the fee, nor was such point necessarily involved, since the grant of the right of way for the construction of the railroad, whatever its nature, necessarily carried the right of possession thereto, as against any inconsistent use thereof. I do not think, therefore, that the case of *Railway Co vs. Roberts* should be held to be an adjudication by the supreme court that a grant of the right of way over the public domain is not the grant of an easement therein, but necessarily carried the fee thereof, or that the court so intended it, especially where, as in the case at bar, the act of Congress grants to the railroad company various sections of the public lands, for which it is provided patents shall be issued by the officers of the government, and also grants the right of way over lands of the government, for which no provision is made for the issuance of any evidence of title. Of course this distinction in the grant between

the lands granted in aid of the construction of the road, and the right of way therefor, is not conclusive, for the fee of land may be granted by direct act of Congress. But, in my opinion, it strongly indicates that Congress did not intend that the grant of the right of way of the Atlantic & Pacific Railroad Company should cover the fee of the lands included only within the right of way, but only such an easement therein as, under the settled rules of law, is usually covered by such grants. *Williams vs. Railway Co. (Wis.) 5 N. W. 482; Lumber Co. vs. Harris (Tex. Sup.) 13 S. W. 453; St. Onge vs. Day (Colo. Sup.) 18 Pac. 278; Railroad Co. vs. Lesueur (Ariz.) 19 Pac., 157; Mills Em. Dom., Sec. 110.*

Mercantile Trust Co. vs. A. & P. R. R. Co., 63 Fed. 913.

It is perfectly clear that Congress when it passed the act of 1866, creating the Atlantic & Pacific Railroad Company, proceeded upon the assumption that the territories which it had created, including New Mexico, would have the power to tax the company upon its property, and even upon a mere easement or right of passage through the territory, because it found it necessary to insert in that act a special provision that "the right of way shall be exempt from taxation within the territories of the United States."

II.

The exemption of the right of way from taxation does not exempt the improvements thereon.

In other words, reversing the proposition, improvements affixed to the land by the owner of the right of way, do not become a part of the mere easement, but are property—real estate—of that owner, distinct and separable from the mere right of way for purposes of taxation.

The argument of appellees is, that the property, the taxation of which is in question in the present case, is so affixed to the land over which the railroad company

has its right of way, as to become a part of the realty, and whether the grant of the right of way is to be taken as an absolute grant of the land itself, or as conveying only an easement, this property cannot be assessed for purposes of taxation separately from the land itself, but has so become a part of it that it can be taxed only if the land itself be taxable. It is not claimed on the part of the territory that the land can be taxed, or that the easement of the railroad company can be taxed; nor is it claimed that the property in question can be taxed as personal property. It is claimed, however, that, although it must be classed as real estate under our statute, being covered by the statutory definition of "improvements," yet there is nothing in its nature which prevents it from being assessed like any other property. In the first place, our statute clearly contemplates the possibility of improvements being assessed and taxed separately from the land to which they are affixed, as will be seen by reference to section 4019 of the compiled laws of 1897, where we find the following language;

> The terms mentioned in this section are employed throughout this chapter in the sense herein defined:
>
> First. The term "real estate" includes all lands within the territory, to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto, and improvements.
>
> Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

In the absence of such a statute as this there might be more force to the contention that such improvements could not be assessed separately from the ownership of the land, but our statute clearly provides for such a contingency. Our position on this

matter need not rest, however, entirely upon construction of the statute, but is amply supported by adjudicated cases.

The property assessed in this case is the track of the relators consisting of its stringers, ties and rails. This track is laid down in the public highway, and the relators have or claim no interest in the land of the highway, save a right to use the same for the passage of their teams and vehicles to and fro over this track. This right they claim, and doubtless have, and it includes a right to the constant and exclusive, and for the extent of their chartered existence, the lasting use of the soil, for the support of their track. It is an easement. (*Williams vs. New York Central Railroad Co., 16 N. Y. 97-109; Craig vs. R. & B. R. R. Co., 39 N. Y., 404.*) And this is an interest in the land over which it is enjoyed. (*Washburn on Easements, 6.*) It gives them the right of the exclusive possession as from time to time they shall need to use any part of it.

By the statutes in relation to easements and taxation (*1 R. S., 360, Sections 1, 2,*) "all lands * * * within this state, whether owned by individuals or corporations, shall be liable to taxation * * *" "The term 'land' * * * shall be construed to include the land itself, and all buildings, and all other articles erected on or affixed to the same * * * and the terms 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined."

By force of these provisions, the track of the relators, consisting of stringers, ties and rails, affixed to the land, is, for the purpose of assessment and taxation, land, real estate, real property. And is liable to taxation. To some name, or in some way it should be assessed. This does not seem to be seriously disputed by the relators. But they suggest that if the assessors did their duty, which is always to be presumed, then they assessed to the owners of the fee in the land, over which the highway run, the land to the center of the highway, and must be presumed to have assessed to them, the land at a valuation affected and increased by the value of the fixtures, which make the track of the relators. We do not think

that such a presumption can be entertained. The facts in the case are too potent and well known to permit the presumption, that the track was considered as belonging to the owner of the fee, which is little more than a reversion, contingent if at any time in the future the different rights of way over the land shall cease.

We are not inclined to give to the terms of the statute a construction so narrow as that required by the position of the relators. That would be to hold that buildings and fixtures are not included in the term "land," except as inseparable, in the consideration of the ownership thereof, from the ownership of the fee; and that no right or interest in the land less than the fee thereof would, for the purpose of assessment, be deemed to fall within the meaning of "land," as set forth in the statute. The statute means, for its purpose, to make two general divisions of property; one all lands, another all personal estates; and then to be more definite, it declares, that by land is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not in the view of the statute, land, unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion that the statute means that such an interest in real estate, as will protect the erection, or affixing thereon, and the possession of buildings and fixtures, will bring those buildings and fixtures within the term "lands," and hold them to assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures.

The defendants were right then, in considering the right of the relators as land, and liable to assessment as such. (See *The People vs. Beardsley, 52 Barb., 105*, since (September, 1869,) affirmed in this court.)

People vs. Casity, 46 N. Y., 48-50.

People vs. Commissioners, 82 N. Y. 462-3.

This is a tax suit, the defendant claiming that no taxes on the property can be recovered of him. The city and county of San Francisco, in 1875,

under the act of March 30th, 1875, leased to defendant a portion of the school lot belonging to the city and county, located at the corner of Market and Fifth streets. The defendant took possession of the leased land and made improvements and erected a substantial four story frame building, with brick foundation, attached to the soil. For the fiscal year 1881-2 the building and improvements were assessed to defendant, and this suit is to recover the taxes. The defendant insists that he is not liable for the taxes, because, he says, first, the city and county own the realty, the improvements and building are portions of the realty, and therefore not his property; and second, section 3887 of the Political Code, as in force at the date of the lease, declared that the "lessor of real estate is liable for the taxes thereon," and the city and county, being liable, cannot recover of him.

It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purpose of revenue, the legislature of this state has observed a distinction between real estate and improvements, and that distinction has been recognized by this court.

Section 3607 of the Political Code, as in force in 1875, declared that property of municipal corporations was not subject to taxation. If, as contended, the building and improvements were portion of the realty and thus exempt, the provisions of the constitution of 1863, as to uniformity of taxation, might be evaded.

We are of the opinion that, for the purpose of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes.

San Francisco vs. McGinn, 67 Cal. 110.

People vs. Shearer, 30 Cal. 656.

Crocker vs. Donovan, 30 Pac. 377.

Turney vs. Saunders, 4 Scam. 527.

Waller vs. Hughes, 11 Pac. 122.

Gold Hill vs. Caledonia Co., 5 Sawyer, 575.

A. & P. R. Co. vs. Lesueur, 19 Pac., 159.

For the purpose of taxation each (land and buildings erected thereon) is separate and dis-

tinct from the other. The exemption of the land from taxation does not imply the exemption of the buildings erected thereon, any more than the exemption of the building implies the exemption of the land. As respects taxation the two descriptions of property are as separate and distinguishable as real estate is from personal property. The statute means what it says and no more; if the legislature intended to give it a broader meaning than is expressed it would have said so. The court will not enlarge the meaning of the statute by implication in order to give it an effect contrary to common right.

Portland, etc., R. R. Co. vs. Saco, 60 Me. 196.

III.

Exemption from Taxation is the Exception, and all such Exemptions are to be Strictly Construed.

It ought not to be necessary to cite authorities in support of this proposition, but because of the attempt to extend by implication the exemption given by congress to something far beyond its terms, on account of the alleged congressional purposes in creating the railroad company, and by the suggestion that, in order to be of great value the exemption must certainly include more than is indicated by the language used, attention will be called to a few cases as illustrative of the strictness with which this rule is held and enforced by the courts.

In the leading case of *Providence Bank vs. Billings, 4 Pet. 514, Chief Justice* Marshall, speaking of a partial release of the power of taxation by a state in a charter to a corporation, said: "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." "We must look for the exemption in the language

of the instrument; and if we do not find it there, it would be going very far to insert it by construction." *(4 Pet. 561-563.)*

In Philadelphia & Wilmington Railroad vs. Maryland, 10 How. 376, Chief Justice Taney said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." *(10 How. 393.)*

In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken"; that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt"; that "nothing can be taken against the state by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arises as to the intent of the legislature, that doubt must be solved in favor of the state;" that a state "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris.*" *Jefferson Branch Bank vs. Skelly, 1 Black 436, 446; Gilman vs. Sheboygan, 2 Black, 510, 513; Delaware Railroad Tax, 18 Wall., 206, 225, 226; Hoge vs. Railroad Co., 99 U. S. 348, 355; Southwestern Railroad vs. Wright, 116 U. S. 231, 236; Erie Railway vs. Pennsyvania, 21 Wall., 492, 499; Memphis Gaslight Co. vs. Shelby Taxing District, 109 U. S. 398, 401; Tucker vs. Ferguson, 22 Wall., 527, 575; West Wisconsin Railway vs. Supervisors, 93 U. S. 597; Memphis & Little Rock Railroad vs. Railroad Commissioners, 122 U. S. 609, 617, 618.*

Railroad Co. vs. Dennis, 116 U. S. 667-8-9.
Banks vs. Tennessee, 104 U. S. 496-7.
Railroad Co. vs. Thomas, 132 U. S. 185.
Schurz vs. Cook, 148 U. S. 409.
Railroad Co. vs. Alsbrook, 146 U. S. 294.
Railroad Co. vs. Guffey, 120 U. S. 574-5.
Land Co. vs. Minnesota, 159 U. S. 529.
A. & P. R. Co. vs. Lesueur, 19 Pac. 159.

IV.

The Territorial Legislature possesses all the power of Congress in Legislating for the Territories, subject only to the express limitations imposed by Congress itself.

At the first glance it may be difficult to see what this proposition has to do with these cases, or why it is necessary to present argument in its support, established as it is by former decisions for this court. By reference, however, to the opinion of the supreme court of New Mexico, which appears in the record of case No. 106, beginning at page 69—and we are here to show the unsoundness of that opinion—it will be seen that the conclusions reached are based upon two positions, the first being that territorial governments are of such inferior character that their legislation is entitled to but little weight; and the other that a liberal rule of construction must be applied to the exemption of the right of way from taxation, instead of the usual construction applied by courts to such exemptions. The second position to some extent depends upon the establishment of the first.

That court in that opinion holds, in substance, that the territorial governments have but limited and special powers, specifically enumerated by congress, while appellant's position is that those governments have, as has been declared by this court, very broad

and ample powers, but little, if any, inferior to those possessed by the states.

In order to avoid any misunderstanding of this contention, quotation is made from the opinion of the court below of that which appears most strongly and clearly to state the proposition upon which the case is made to turn, as follows:

> It is true that exemption from taxation by a state is construed with strictness in favor of a state, but it will be observed that this discrimination exists where the exemption is the action of a state as to property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in a territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other. It is not, we conceive, legitimate in arriving at the rights of the territory in the premises, to consider it as though it had created a factor and was exacting a tribute for its favor. The United States presents no problem, asserts no claim, having by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Without a controversy between the government and the company, the grant should, in the language of the supreme court, *150 U. S., page 14*, receive a liberal construction in favor of the purpose for which it was enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress and not to oppress in the interest of a local government.

It will be seen that the court holds in effect that if this controversy were between the United States and the railroad company—if this were a question arising as to legislation by Congress imposing a tax—a differ

ent rule of construction would be applied to the exemption question from that which is proper in considering legislation of the territory.

I desire to reiterate that acts of the territorial legislatures are to be considered by the courts, so long as they are not inconsistent with the laws and constitution of the United States, as of the same importance and dignity as laws enacted by Congress itself for the government of the territories, and that they are not hedged about, hampered or obstructed as are the acts of Congress itself when that body is legislating for the country at large in the exercise of its limited and delegated powers.

The constitution of the United States confers upon Congress certain enumerated and specific powers, and it is conceded by the advocates of even the most liberal rule of constitutional construction, that the federal Congress can exercise no other powers than those which are expressly set forth in the constitution, or are necessarily implied; but this part of the constitution and this doctrine applies to the powers of Congress delegated by the states and to be exercised in and for the states. When we come to the consideration of the power of Congress to legislate for the territories, as set forth in the constitution, or as established by a long course of congressional and judicial construction, we find that that power is absolute, complete and unlimited (except by the constitutional provisions as to rights of persons and property) as would be the power of a state legislature if unhampered by a state constitution. This power, in almost its entirety, has been delegated by Congress to the territorial legislatures. Nothing can be found in adjudicated cases inconsistent with this view, and every expression of this court is in harmony with it, and it is clearly recognized in at least one territorial case, from which quotation will be hereafter made.

At the outset of the consideration of authorities on this subject it is essential to call attention to the language of this court in what is undoubtedly the leading case as to the character of territorial governments:

> Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject also, however, to the right of Congress to revise, alter and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively coextensive with and corresponding to that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction.
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> *Hornbuckle vs. Toombs, 18 Wall., 657.*

In another case this court has declared that the theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. In the same case the court further says that "in all the territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all."

Clinton vs. Englebrecht, 13 Wallace, 441, 443-4.

> While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section six of the act of September 9th, 1850, (9 Stat. at L. 453,) establishing a territorial government for Utah, it is provided: "That the legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands of other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the territorial legislature was apparently plenary as that of a legislature of a state. *Maynard vs. Hill, 125 U. S. 204.* The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.

Cope vs. Cope, 137 U. S., 684.

The case last cited is also interesting and instructive because it proceeds elaborately to consider the effect of congressional enactments under which an annulment of territorial statutes by implication was claimed, in precisely the same way as would be considered the question of a repeal by implication of an act of the Congress itself, thus clearly putting territorial legislation on the same level as legislation by Congress.

In the territory of Utah a case arose involving the validity of an act of the legislature of the territory of Idaho by which the bonds of matrimony between Ly-

man P. Higbee and his wife were declared dissolved, and the supreme court of Utah, in a very elaborate opinion, held that such an act was beyond the power of a territorial legislature.

In re Higbee, 5 Pac. 694 et seq

Attention is called to this Utah case for the sake of emphasizing an opinion of this court, which is directly opposite to that of the territorial court. In the opinion of this court, at some length, but with great clearness, the almost unlimited power of territorial legislatures is upheld, and language is used indicating at least an unwillingness positively to declare that the prohibition of the federal constitution against the impairment of contracts applies to legislation by territorial legislatures,—an unwillingness only consistent with the position which we take that the territorial legislatures are really Congress in another form.

Maynard vs. Hill, 125 U. S. 203, 210.

In more recent cases in this court, like views of the extent of the legislative power of territorial governments are expressed.

Thomas vs. Gay, 169 U. S. 271-2-3.

McHenry vs. Alford, 168 U. S. 664, 669.

> The only question presented in the court below or in this court, is the effect as to the plaintiff in error of said section 118, Rev. St. Wyo. It is urged that this section is in its nature and effect a bankrupt or insolvent law, and that the legislature of the Territory of Wyoming had no power to pass a bankrupt or insolvent law. Without discussing the question as to how far this section 118 partakes of the nature of a bankrupt or insolvent law, and waiving the question as to what the effect would be upon the other portions of the assignment law if this section should be found invalid, we will consider the power or authority of the legislature to pass such a law. The argument of the plaintiff in error, stated briefly, is that the authority of the legislature of Wyoming territory was derived from Congress, that Congress could

confer no greater power than it had itself; and that Congress had no power or authority to pass a bankrupt or insolvent law for Wyoming territory. This argument rests upon the assumption, which is made as the basis of the argument, that the power of Congress upon this subject is derived from and limited by sub-division four of section eight of article one of the constitution of the United States, conferring upon Congress power to establish "uniform laws on the subject of bankruptcies throughout the United States." As to this contention it is sufficient to say that the power of Congress to legislate for the territories is not derived from nor limited by this nor any other express provision or provisions of the constitution. As to the extent of this power the supreme court of the United States says: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. Congress may not only abrogate laws of the territorial legislature, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all departments of the territorial government. It may do for the territories what the people, under the constitution of the United States, may do for the state." *National Bank vs. County of Yankton, 101 U. S. 129.* It is thus apparent that the doctrine that the general government is one of limited powers granted by the states, and enumerated in the express provisions of the constitution, or derived by necessary implication from such enumerated powers, however just and salutary, as applied to the states, has no application to the territories of the United States. The power of Congress to legislate for the territories, is not to be compared to nor measured by its powers to legislate for the people of the states. It is not a power which was granted to the general government in the adoption of the constitution by the states. It is not one which was withheld by them. It is one which they never possessed, either to grant or withhold. It is one of the essential and most important attributes of sovereignty; a sovereignty

which no state ever possessed or claimed or attempted to exercise outside of its own boundaries. The source of this plenary power of legislation for the territories our courts have seldom, if ever, attempted to define. As to its existence, there is at this day no question. "Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the powers and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from whence the power is derived, the possession of it is unquestioned. In legislating for them (the territories) Congress exercises the combined power of the general and of a state government." *Insurance Co. vs. Canter, 1 Pet. 541.* This language was commented upon and explained in the case of *Dred Scott vs. Sanford,* but not so as to interfere with its application to cases such as the one at bar. "The distinction between federal and state jurisdiction under the constitution of the United States has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of the courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction." *Benner vs. Porter, 9 How. 242.*

Downes vs. Parshall, 26 Pac. 995.

Ty vs. Guyot, 22 Pac. 134.

A. & P. R. R. Co. vs. Lesueur, 19 Pac. 160.

V.

Nothing but a strict rule of construction can be properly applicable to the exemption of the right of way from taxation.

As has been already shown, the court below in great part, at least, put its denial of this proposition upon the ground that this controversy is not one between the railroad company and the power which granted the exemption, and we have endeavored to show that, so far as it rests upon this basis, that court is in error. The reasoning adopted by the court, based upon what was, or ought to have been, the intent of Congress, in view of the conditions existing at the time of the passage of the act in 1866, and of the difficulties in the way of constructing the proposed railroad, is of precisely the same character as that which was urged upon this court in at least two similar cases, but without avail.

> It is argued in support of this writ of error that, as the exemption from taxation of the capital stock was unqualified and perpetual and began at the moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after the completion of the railroad; and that the legislature, while exempting the railroad from taxation for ten years after its completion, *could not have intended to subject it to taxation before its completion and while its earnings were little or nothing.*
>
> On the other hand, it is argued that the consideration of the exemption from taxation, as of all franchises and privileges granted by the state to the corporation, was the undertaking of the corporation to prosecute to completion, within a reasonable time, the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said railroad"

without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the state had never allowed a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the supreme court of Louisiana in *State vs. Morgan, 28 La. Ann., 482, 491*, and in the case at bar, *34 La. Ann., 954, 958.*

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous.

In their natural and legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. If the legislature had intended to limit the end only and not the beginning of the exemption, its purposes could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter.

To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to *insert by construction* what is not found in the language of the contract; to presume an intention which the legislature has not manifested in clear and unmistakable terms; to surrender the taxing power, and to go against the uniform current of decisions of this court upon the subject, as shown by the case above referred to.

Railroad Co. vs. Dennis, 116 U. S., 669-70.

By the eighth section of the company's charter it was declared "that said company, its stock, its railroads and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted, not to include compresses or oil mills, shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this state." If the provision had terminated with the words "Mississippi river," it would not be open to argument in this court that the exemption claimed did not commence until the river was reached.

In *Vicksburg, S. & P. R. Co. vs. Dennis, 116 U. S., 665*, it was held that a provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, work-shops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this state," did not exempt the road, fixtures and appurtenances from taxation before such completion. It was argued, as it is here, that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion, and when its earnings were little or nothing; on the other hand, it was argued there, as it is here, that one reason for defining the exemption of the road and its appurtenances from taxation, as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation by postponing or omitting the completion of a portion of the road; but this court said, speaking through Mr. Justice Gray: "Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision where the

words of the statute creating the exemption are plain, definite and unambiguous." It appeared there, as it does here, that the taxing officers of the state had omitted in previous years to assess the property, but it was held that such omission could not "control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." And the court took occasion to reiterate the well settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*.

Tested by that rule, did the addition of the words "but not to extend beyond twenty-five years from the date of the approval of this act," operate to create an exemption of twenty-five years from the date of the act, subject to being reduced to less than that if the road were completed to the river before the lapse of five years, but for twenty years at all events; or did it operate to reduce the term of the twenty years exemption by so much as the completion of the road to the river took over five years. Upon the one view there would be a loss of the exemption through the rapidity of construction; in the other view, a gain, or rather, the prevention of a loss. Does it appear by clear and unambiguous language that the state intended to surrender the right of taxation for twenty-five years? If the surrender admits of a reasonable construction consistent with the reservation of the power for a portion of the longer period, then for that portion it cannot be held to have been surrendered. Is not the construction that the exemption was to be for a term of twenty years, subject to a diminution of that term if the river were not reached in five years, as reasonable as the opposite construction; and if the latter construction be adopted, would it not be extending the exemption beyond what the language of the concession clearly requires? Can an exemption expressly limited to a term of twenty years after the accomplishment of a designated work, but not to extend beyond twenty-five years from a certain date, be read as an exemption for twenty-five years, but not to

extend beyond twenty years from the completion of that work? It seems to us, notwithstanding the ample and ingenious arguments of appellant's counsel, that these questions answer themselves, and that the exemption claimed cannot be sustained.

* * * * * *

Again, the preamble of the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one of "great public importance" and "to be encouraged by legislative sanction and liberality" and that "the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country." But, as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up. Indeed, what is therein stated appears to us to be quite as referable to the remarkably extensive powers granted as to the assignment of reasons for exemption from taxation.

It is true that it is stated in section eight that, in order to encourage the investment of capital in the enterprise, and "to make certain in advance of such investment, and as inducement and consideration therefor, the taxes and burdens which the state will and will not impose thereon," the exemption is thereby declared. Yet if, notwithstanding that statement, the matter were left uncertain, that would not allow the court to make it certain by construction, and to *remove ambiguity upon the presumption of a legislative intent* contrary to the fixed presumption where the rights of the public are involved. In short, there can be no uncertainty in the result where the language used is construed, as it must be, in accordance with thoroughly settled principles.

R. R. Co. vs. Thomas, 132 U. S. 184-5-6, 188-9.

In the present case, in order to sustain the greatly expanded exemption claimed by the railroad company, it has been necessary for the court below to take judicial notice of a great variety of conditions and facts which it is urged tend to show what must have been the intention of Congress in creating and aiding the railroad company, and certainly such a necessity must be "in itself fatal to the claim set up," quite as much as the necessity of resorting to a preamble of an act "to assist in ascertaining the true intent and meaning of the legislature." In that preamble, things were distinctly and clearly set out so as to indicate what was within the contemplation of the legislature, and it was, therefore, much more certain and definite than any general view of the condition of the country and the circumstances surrounding the proposed construction of a railroad.

We call particular attention to the language of this court in a recent case, where it speaks as follows:

> The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power.
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> *R. R. Co. vs. Alsbrook, 146 U. S. 294.*
>
> *Keokuk R. Co., vs. Missouri, 152 U. S. 306.*

It is quite obvious from a mere casual examination of the opinion of the court below, that the language used by Congress in the act of 1866 as to the exemption, certainly "admits of reasonable contention," and this being so, "the conclusion is inevitable" against the position of the railroad company. We have cer-

tainly had a large amount of "reasonable contention" as to what the statute means.

In conclusion, it may be said that this court has never neglected any opportunity to reiterate its well-established doctrine upon this subject. In a recent case, decided in December, 1896, where the court was considering the question of the passage to a new corporation, which succeeded an old one, of the exemptions and immunities of the earlier corporation, the following language is used:

> These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or an immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan vs. Louisiana, 93 U. S., 217*, without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case *(Norfolk & Western R. R. vs. Pendleton, 156 U. S., 667, 673,)* we had occasion to say, in harmony with repeated decisions, that, "in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of a state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or purchase under foreclosure, to the property and ordinary franchises of the first grantee:" and that this was a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and expressed requirements of

the grant construed *strictissimi juris. Morgan vs. Louisiana, 93 U. S., 217. Wilson vs. Gains, 103 U. S., 417. Chesapeake & Ohio R. R. vs. Miller, 114 U. S., 176.*

Turnpike Road Co. vs. Sandford, 164 U. S. 586-7.

It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause.

Ford vs. Land Co., 164 U. S., 666.

In the case just cited, this court, in harmony with the general principles to which it has constantly adhered, held that the effect of a statutory exemption from taxation should be restricted to something less than the absolute letter of the statute appeared to demand. A statute which exempted from taxation "all of the property and effects" of a corporation was held not to extend to some of the "property and effects" of that corporation because they were acquired under the authority of another statute passed at a later date than the one which contained the clause of exemption.

Ford vs. Land Co., 164 U. S., 666, 668-9.

These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being made the sole means by which sovereignties can

> maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must, on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.
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> *Bank vs. Tennessee, 161 U. S. 146.*

The court below refers to the case in *150 U. S.*, at page 14, in support of its position that the grant should "receive a liberal construction in favor of the purpose for which it was enacted." This is strange, to say the least, because, in that case, on the same page 14, the court says that it is "the well settled rule of this court that public grants are construed strictly against the grantees;" and on page 13, it is stated that "exemption from taxation is construed with greater strictness in favor of the state than grants of public property or rights."

U. S. vs. D. & R. G. R. Co., 150 U. S. 13, 14.

VI.

"The existence of a well founded doubt is equivalent to a denial of the claim" to an exemption from taxation.

The words above included in quotation marks are taken from a recent opinion of this court.

Insurance Co. vs. Tennessee, 161 U. S., 177-8.

As hereinbefore sought to be shown, a mere inspection of the opinion of the court below clearly indicates the existence of at least "a well founded doubt." In that opinion great stress is laid upon a variety of extraneous facts, outside of the legislation of congress and outside of the record, of which the court takes judicial notice, all for the purpose of ascertaining the supposed intent of Congress in granting the exemption in question. Such elaborate discussion and consideration of matters of this kind could hardly have been necessary in order to sustain the conclusion reached by the court if it could be said that there was no "well founded doubt" in existence.

Attention is called to the case last above cited for the reason also that counsel there urged upon the court a variety of "surrounding circumstances" which it was claimed should influence the conclusion of the court as to the meaning of the statutes under consideration, but the court could not find in such matters any sufficient reason "to depart from the universal and well established rule making a claim for exemption a matter to be proved beyond all doubt."

VII.

There is more than enough to be found in the statute to give full effect to the intention of Congress to aid the railroad, without considering the exemption of the right of way at all.

None of the other land grant railroads received larger donations of land per mile than the Atlantic & Pacific, and it is believed that but one other had its right of way exempted from taxation. Legislation by Congress to provide aid to railroads began in 1862, and continued until long after the charter of the Atlantic & Pacific. The Union-Central Pacific line obtained the passage of its first act in 1862, and another in 1864, greatly increasing the benefits conferred by the first act. The disposition of Congress and of the country was such that the projectors of that line, the first to be constructed, could have obtained almost anything they chose to ask for, but it does not seem to have occurred to anyone to attempt to secure a perpetual exemption from taxation of nearly all the property of the road, by exempting its right of way.

The Atlantic & Pacific route was notoriously the least expensive to construct and operate of any of the proposed roads from the Missouri river to the Pacific coast, and yet it is seriously claimed that in order to give effect to the necessary intent of Congress to aid in its construction, we must hold that a perpetual exemption of almost everything was given in order to induce the investment of capital. The extent of this exemption will appear by comparing what the company has actually paid in any year with what it would pay had it not claimed this exemption. For the year 1893, in Valencia county, it paid as taxes on its property, outside of lands, the sum of $75.28. Upon its lands it paid $2,004.99.

Record in No. 169, pp. 56-7.

The tax claimed by the appellant on the disputed items for the same year, in the same county, amounts to $23,064.63.

Same Record, p. 30.

The record shows that there were over ninety miles of road in Valencia county, and eight stations, worth over $400,000.

Same Record, p. 82.

Let us consider what this railroad company was given by Congress aside from this exemption:

It was given a right of way through the public lands; the right to take from the public domain adjacent to the road material of earth, stone, timber and so forth, for the construction thereof; lands to the extent of 12,800 acres per mile where the road should pass through any state, and 25,600 acres per mile through the territories, and the right of eminent domain. It was also expressly declared to be a post route and military road, which, while imposing certain duties towards the government, gives it privileges and immunities which it might not otherwise enjoy. The estimated length of the line when projected was about 2,500 miles, and the lands granted would amount to over 50,000,000 acres.

No reason can be found for expanding this exemption from taxation beyond the necessary meaning of the words employed in the statute, nor for applying to it any rule of construction different from that which has been so often announced in the opinions of this court.

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